

Dubovsky and Sons, Inc., and Local 807, International Brotherhood of Teamsters, AFL-CIO, Petitioner and Local 8-A-28A, Metal Polishers, Production and Novelty Workers Union, AFL-CIO, Union and Intervenor and Albert Ford, Petitioner. Cases 29-RC-8806 and 29-RD-859

November 7, 1997

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered an objection to an election held on June 5 and 6, 1997, and the hearing officer's recommended disposition of it. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 46 for the Petitioner Union, no votes for the Intervenor, and 1 vote against the participating labor organizations, with 2 challenged ballots, an insufficient number to affect the results. The Board has reviewed the record in light of the exceptions and brief, has adopted the hearing officer's findings as modified,¹ and recommendations, and finds that a certification of representative should be issued.

The hearing officer found no merit in the Employer's objection that the Petitioner Union engaged in improper electioneering during the course of the June 5 and 6, 1997 election. In so finding, the hearing officer applied the standard which the Board uses to evaluate allegedly objectionable conduct by third parties to evaluate both the June 5 conduct of Albert Ford (the Petitioner in Case 29-RD-859 and the election observer for the Petitioner Union in Case 29-RC-8806) and the conduct of others on June 5 and 6. We agree with the hearing officer that none of the conduct alleged to be objectionable, whether considered individually or cumulatively, impaired employee free choice under the third-party standard. However, we disagree with her application of that standard to Ford's conduct. Rather, Ford, both in his capacity as the decertification petitioner in the election to oust Metal Polishers Local 8A-28-A, and in his limited agency while he served

as observer for the Petitioner Union,² is subject to the standard which the Board uses to evaluate allegedly objectionable conduct by parties to the election.³ For the same reason, we find, contrary to the hearing officer, that the principles of *Milchem, Inc.*, 170 NLRB 362 (1968), apply to communications between Ford and voters waiting in line to vote.

Ford's conduct on June 5, as found by the hearing officer, consisted of: (1) Ford's response to a voter's question "how are you doing?" with the word "fine"; (2) a 10 to 20-second whispered response by Ford to a whispered 30 to 40-second question from a voter;⁴ (3) two affirmative nods of the head to voters who attempted to initiate conversations with Ford; and (4) a remark by Ford to the Board agent concerning the eligibility of an employee to vote.

The Employer contends that these communications fall within the *Milchem* prohibition of "sustained conversation with voters waiting to cast their ballots" We disagree. Only the first two communications summarized above can be viewed as "conversations" between Ford and "voters waiting to cast their ballots." The first was no more than the type of "social pleasantries" that the Board has declined to find to be objectionable electioneering, whether initiated by the observer, or, as here, by the voter.⁵ The second, also initiated by the voter, consisted of too brief a response by Ford to constitute part of an objectionable "sustained" conversation, as proscribed in *Milchem*.⁶ Finally, we find nothing, either under *Milchem* or other precedent, that warrants setting aside the election based on any of Ford's conduct during the election.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Local 807, International Brotherhood of Teamsters, AFL-CIO, and that it is the exclusive representative of the employees in the following appropriate unit:

All full-time and regular part-time grocery warehouse employees and drivers employed by the

¹The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility findings unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

In adopting the hearing officer's finding that the Petitioner Union did not engage in objectionable electioneering on June 6, 1997, we disavow her reliance on the Employer's failure to provide evidence that employees waiting in line to vote had been influenced by any remarks that may have been made by individuals in the adjacent parking lot. This disavowal does not affect our disposition of this objection.

²See *NLRB v. WFMT*, 997 F.2d 269, 275 (7th Cir. 1993) (observer Terkel found to be the union's representative under *Milchem*).

³*Windsor House*, 309 NLRB 693 (1992), relied on by the hearing office, does not hold to the contrary. There an individual who served as a union election observer was found not to be an agent of the union, and the third-party standard was applied to evaluate conduct that was outside of that individual's responsibilities as an observer. In contrast, it is Ford's conduct at the polls while he served as observer for the Petitioner Union that is alleged to be objectionable.

⁴The record does not establish what he said.

⁵See *Modern Hard Chrome Service Co.*, 187 NLRB 82 (1970).

⁶See *NLRB v. Vista Hill Foundation*, 639 F.2d 479 (9th Cir. 1980), enfg. 239 NLRB 667 (1978) (six brief conversations, some involving the election, held not to "present in the aggregate the 'prolonged conversations' . . . found in *Milchem* to represent a 'potential for distraction, last minute electioneering, and unfair advantage'").

Employer at its 65-35 Auto Road, Glendale, New York, location; excluding all office clerical em-

ployees, computer employees, salesmen, guards and supervisors as defined in the Act.